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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CURTIS JOHNSON,

Defendant and Appellant.

B264651

(Los Angeles County
Super. Ct. No. BA384415)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Craig Richman, Judge. Affirmed.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant
and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Curtis Johnson appeals the denial of post-trial motions following his conviction of assault with a firearm, felon in possession of a firearm, and possession of an illegal shotgun. After this court affirmed his convictions and sentence on appeal, Johnson filed pro se new trial motions in the trial court which were denied as untimely and on the merits. We now affirm those rulings.

BACKGROUND

Johnson represented himself at the evidentiary portion of his trial. The evidence showed¹ that he and his occasional roommate argued, after which Johnson shot at her with a sawed-off shotgun, put the barrel of the shotgun into her mouth and threatened to kill her, and then threatened a second person before fleeing from the scene. Johnson testified in his own defense, denying that he had anything to do with the shooting and asserting that he did not even own a shotgun.

The jury convicted Johnson of assault with a firearm with a finding that he personally used a firearm (Pen. Code, §§ 245, subd. (a)(2), 12022.5, subd. (a); count 1)², being a felon in possession of a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 2) and possessing a short-barreled shotgun (former § 12020, subd. (a)(1), now § 33210; count 3). After the jury found him guilty, Johnson relinquished his pro se status and counsel was appointed for purposes of sentencing. Following a court trial, the trial judge found true the allegations that Johnson had been convicted of two prior serious felonies (§ 667, subd. (a)), which were also strikes pursuant to the “Three Strikes” law (§§ 667, subds. (b)-(e), 1170.12, subds. (a)-(d)), and that he had served seven prior prison terms for felony convictions (§ 667.5, subd. (b)).

At sentencing, pursuant to section 1385, subdivision (a), the trial court dismissed one of the Three Strikes prior conviction findings, as well as the seven prior prison term enhancement findings. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

¹ These and subsequent facts are taken from our unpublished decision in Johnson’s prior appeal, *People v. Johnson* (Sept. 24, 2013, B240999) [nonpub. opn.].

² All further statutory references are to the Penal Code unless otherwise specified.

The trial court then imposed a determinate second-strike term of 28 years in state prison, calculated as follows. On count 1, assault, the court sentenced Johnson to eight years (the upper term of four years, doubled under the Three Strikes law), enhanced by two consecutive terms of 10 years for the personal use of a firearm and for the two prior serious felony convictions. On count 2, being a felon in possession of a firearm, the trial court imposed a concurrent term of six years (the upper term of three years, doubled under the Three Strikes law). On count 3, the trial court stayed sentencing for the offense of possessing a short-barreled shotgun pursuant to section 654, the prohibition on multiple punishment.

This court, in *People v. Johnson, supra*, B240999, then affirmed Johnson's convictions and sentence on appeal, during which he was represented by appointed appellate counsel. Subsequently, on January 7, 2014, Johnson filed a pro se new trial motion which raised issues concerning both the conduct of the evidentiary portion of his trial as well as decisions made at his sentencing. On April 29, 2015, the trial court ruled that Johnson's new trial motion was untimely, but the court also denied the motion on the merits. On May 4, 2015, Johnson filed a pro se motion for sentence modification under section 1181. On June 26, 2015, the trial court denied this second motion, again finding it untimely while also denying it on the merits.

Meanwhile, on May 26, 2015, Johnson filed a pro se notice of appeal purportedly from a trial court judgment rendered "April 4, 2015." On February 18, 2016, we construed this document as a timely notice of appeal "from the denial of a new trial on April 29, 2015, and from the denial of a motion for resentencing on June 26, 2015."

We appointed counsel to represent Johnson on this appeal. After reviewing the record, appellate counsel filed an opening brief requesting this court to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441. We directed counsel to send the record on appeal and a copy of the opening brief to Johnson, and notified defendant he had 30 days within which to personally submit any contentions or issues that he wished us to consider. No supplemental brief was filed.

DISCUSSION

“When a verdict has been rendered or a finding made against the defendant, he may move for a new trial on various statutory grounds including that the verdict is contrary to the law or evidence. (§ 1181.) A trial court may grant a motion for new trial only if the defendant demonstrates reversible error. [Citation.] With regard to claims of sufficiency of the evidence, we have stated: ‘In reviewing a motion for a new trial, the trial court must weigh the evidence independently. [Citation.] It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it. [Citation.] The trial court “should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.” [Citation.]’ [Citation.] On appeal, a trial court’s ruling on a motion for new trial is reviewed for abuse of discretion. [Citation.] Its ruling will not be disturbed on appeal ‘ “unless a manifest and unmistakable abuse of discretion clearly appears.” [Citation.]’ [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159-1160, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Johnson’s post-judgment motions were indeed untimely. (See § 1182 [“application for a new trial must be made and determined before judgment”]; § 1181 [enumerating statutory grounds for new trial motion]; *Thurmond v. Superior Court of Solano County* (1957) 49 Cal.2d 17, 19 [“Under section 1182 of the Penal Code an application for a new trial must be made before judgment or within 20 days after the making of an order granting probation, whichever first occurs. . . .”].)

It further appears that the trial court did not abuse its discretion by denying Johnson’s post-judgment motions on the merits. Johnson complained in his post-judgment motions that – based on *mere circumstantial evidence* – the jury “with no victim, no injury, or no assault” convicted him of “inflicting bodily injury” on the victim. However, as to the type of evidence presented, Judicial Council of California Criminal Jury Instructions (2016) CALCRIM No. 223 instructs a jury: “Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the

elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other.” And Johnson is wrong about the jury’s findings; as we recorded in Johnson’s direct appeal, the jury convicted him of assault with an enhancement for personal firearm use, not an enhancement for having inflicted great bodily injury. The evidence demonstrated that he shot at the victim at one point, and stuck the barrel of his shotgun in her mouth at another point. (See *People v. White* (2015) 241 Cal.App.4th 881, 884 [“Section 245 ‘is directed at the force used, and it is immaterial whether the force actually results in any injury. The focus is on force likely to produce great bodily injury.’ ”].)

Johnson also complained about how various evidentiary and related trial issues were handled, but he chose to represent himself at trial (as was his right under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525]), and a “[d]efendant cannot premise a claim of ineffective assistance of counsel on his own shortcomings. [Citation.]” (*People v. Blair* (2005) 36 Cal.4th 686, 734, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920.)

Johnson was represented by counsel at sentencing, but the sentencing issues he raised in his post-judgment motions concerned the fact that his assault term was doubled under the Three Strikes law, claims that seem plainly without merit. Johnson alleged the prosecution violated the Eighth Amendment by charging Three Strikes prior conviction allegations it could not prove, that he never admitted any qualifying Three Strikes priors, and that the jury never found any prior strike allegations to be true. But Johnson is forgetting that, as confirmed by the trial court’s minute order, during the bifurcated aspect of his trial he waived his right to a jury trial on the prior conviction allegations and, at the ensuing court trial, the court found the allegations to be true.³ Johnson complained that the use of his 1978 aggravated assault conviction to qualify him for

³ According to the trial court’s minute order: “Defendant waived jury trial on the priors and priors were found true on 4-20-12.”

treatment under the Three Strikes law amounted to an illegal “bill of attainder.” But this is incorrect both legally (see *People v. Venegas* (1970) 10 Cal.App.3d 814, 823 [“drawing upon a felony conviction . . . prior to [a new law’s] effective date [citation] . . . does not render the new law a bill of attainder or an ex post facto law”]) and factually (the trial court here dismissed the 1978 prior conviction finding and used a post-1994⁴ conviction to sentence Johnson as a second-striker).

We are satisfied that defense counsel has fully complied with the responsibilities we have delegated and that no arguable appellate issue exists. (*Smith v. Robbins* (2000) 528 U.S. 259, 278 [120 S.Ct. 746]; *People v. Kelly* (2006) 40 Cal.4th 106, 110.)

⁴ “The Three Strikes law was enacted twice in 1994, first by the Legislature [citations], and thereafter by the voters by way of Proposition 184 [citations].” (*People v. Johnson* (2015) 61 Cal.4th 674, 681, fn. 1.) It appears from his motions that Johnson was convicted for aggravated assault in 2002 and/or in 2005. On February 16, 2016, we took judicial notice of a trial court minute order dated April 20, 2012, which stated: “The court finds that the defendant has suffered the two alleged strikes. [¶] The court strikes prior A333440 for the purposes of sentencing[] only pursuant to Penal Code section 1385 and strikes all prison priors pursuant to Penal Code section 1385 for the following reasons: [¶] 1) Due to the age of A333440 case; 2) court’s belief that since no one was injured and evidence indicates defendant shot over heads of people involved. Court believes a determinate sentence is appropriate.” The prior case A333440 was Johnson’s 1978 aggravated assault conviction.

DISPOSITION

The judgment is affirmed.

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EDMON, P. J.

We concur:

ALDRICH, J.

HOGUE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.